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No. 82-523

In the Supreme Court of the United States

OCTOBER TERM, 1982

SANGER BOATS, INC., ET AL., PETITIONERS

v.

LAWRENCE SCHWABENLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a recreational boat salesman who was injured while testing a racing boat on navigable waters was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 683 F.2d 309. The opinion of the Benefits Review Board (Pet. App. 18-60) is reported at 13 Ben. Rev. Bd. Serv. (MB) 22. The decision and order of the administrative law judge (Pet. App. 61-88) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1982. The petition for a writ of certiorari was filed on September 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Sanger Boats, Inc., is a manufacturer of high performance recreational and racing boats. Respondent Lawrence Schwabenland was employed by Sanger as a sales

manager (Pet. App. 2). In addition to routine sales duties, however, Schwabenland inspected boats during the course of production, test drove prototypes of new model boats, and performed occasional maintenance on the boats he tested (*id.* at 2-3, 68-69). He also participated in approximately 30 boat races a year to promote Sanger boats (*id.* at 3, 69-70). On July 29, 1973, Schwabenland was test driving one of Sanger's racing boats on the Oakland Estuary, in preparation for a drag boat race, when the boat flipped over, injuring his left leg (*id.* at 3, 21, 62-63).

Schwabenland filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. IV) 901 *et seq.* Petitioners contested the claim, asserting, inter alia, that Schwabenland was not "engaged in maritime employment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3).[1] After a hearing, an administrative law judge ("ALJ") held that Schwabenland's employment "did not have a realistic and significant relationship to the maritime activities involving navigation and commerce over navigable waters" (Pet. App. 85). The ALJ concluded that Schwabenland's inspection, maintenance and testing activities were only incidental to his sales duties and were therefore insufficient to qualify him as a shipbuilder or ship repairman under the statute (*id.* at 82-83). For similar reasons, the ALJ rejected Schwabenland's contention that his regular participation in boat races on behalf of his employer was "maritime employment" within the meaning of Section 2(3) of the Act (Pet. App. 83-87).

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[1]The Act also requires that an injury occur upon a situs defined by Section 3(a), 33 U.S.C. 903(a). Petitioners do not dispute that the injury here occurred on a covered situs.

Both Schwabenland and the Director, Office of Workers' Compensation Programs, appealed to the Benefits Review Board pursuant to 33 U.S.C. 921(b)(3). The Board affirmed the judge's decision by a 2-1 vote (Pet. App. 50, 54, 60). At the outset, the Board rejected the employer's contention, raised for the first time on appeal, that the recreational boat industry as a whole is excluded from the reach of the Act (*id.* at 22-42). The Board, however, affirmed (*id.* at 44) the ALJ's denial of benefits on the ground that Schwabenland did not spend a "substantial portion" of his time engaged in maritime activities.

The Board declared that the overall nature of a claimant's duties determines coverage under the Act (Pet. App. 44). See *Boudloche* v. *Howard Trucking Co.*, 11 Ben. Rev. Bd. Serv. (MB) 687 (1979), rev'd, 632 F.2d 1346 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981). The Board concluded that Schwabenland's involvement in the inspection of boats and testing of new models did not qualify him as a shipbuilder (Pet. App. 44-47), and the remainder of his "arguably maritime" (*id.* at 49) activities did not occupy a "substantial portion" of his time (*ibid.*). The Board therefore denied coverage even though the original Act, prior to its amendment in 1972, had been applied to the death of a land-based janitor who drowned while going for a test ride in one of his employer's motorboats (*id.* at 42-43). *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244 (1941).

Both Schwabenland and the Director petitioned for review of the Board's decision in the court of appeals pursuant to 33 U.S.C. 921(c). The court granted the petitions and reversed the Board (Pet. App. 17). The court concluded that Schwabenland was engaged in "maritime employment" within the meaning of the Act because his work possessed a "realistically significant relationship to 'traditional maritime activity involving navigation and commerce on

navigable waters' " (*id.* at 8; *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976), quoting *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 272 (1972)). The court noted that Schwabenland's "inspection duties, the testing of new models to evaluate their design, and the performance of occasional maintenance in connection with the testing activities would seem to be sufficiently related to the construction of the vessels to constitute maritime employment covered under the Act" (Pet. App. 10).

The court joined two other circuits in rejecting the Board's "substantial portion" test (Pet. App. 11-13). The "substantial portion" test, in the court's view (*id.* at 11-12), is inconsistent with the letter and spirit of this Court's decision in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), which upheld coverage for employees so long as they spent "some of their time" engaged in maritime employment. The court also rejected (Pet. App. 14-17) petitioners' claim that the recreational boat industry is excluded from the reach of the Act, relying on the clear language of the statute and the decision of this Court in *Parker* v. *Motor Boat Sales, Inc., supra*. Lastly, the court refused to consider petitioners' claim, raised for the first time on appeal, that Schwabenland was not covered because of the Act's statutory exclusion of the "master or member of a crew" of a vessel (Pet. App. 6 n.1). See 33 U.S.C. 902(3) and 903(a)(1).

ARGUMENT

Petitioners' principal contention is that the court of appeals has effectively ignored the "status" requirement found in Section 2(3) of the Act, 33 U.S.C. 902(3), because Schwabenland's duties were "only tangentially maritime in nature" (Pet. 13). The court of appeals, however, reached its contrary conclusion by applying the narrow "realistically significant relationship to traditional maritime activity" test

announced in *Weyerhaeuser Co.* v. *Gilmore, supra.* Far from eliminating the status requirement, as petitioners contend, this test is impermissibly restrictive inasmuch as it excludes some employees working on actual navigable waters. See *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (argued Oct. 4, 1982). Because the finding of coverage in this case is justified even under the restrictive "traditional maritime activity" test, and because the result below does not conflict with the decision of any other court, no further review is warranted.

1. Schwabenland was engaged in "maritime employment" under the amended Act because his injury occurred on actual navigable waters. See 81-897 Pet. Br. 18-28.[2] In *Parker* v. *Motor Boat Sales, Inc.*, 314 U.S. 244 (1941), this Court found coverage when the janitor of a recreational boating store drowned during a test ride in one of his employer's motorboats. Despite the fact that the janitor was "predominantly a non-maritime employee" and had never previously gone on the water in the course of his duties, this Court allowed the award, noting that "habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that *clearly maritime activity* that the award was here made" (314 U.S. at 247; footnote omitted; emphasis added).

As fully discussed in the Director's brief in *Director, OWCP* v. *Perini North River Associates, supra*, Congress moved the coverage of the Act shoreward in 1972 to include workers who were injured on the new, broadly defined situs of the Act. 33 U.S.C. 903(a). The indisputable congressional purpose behind the 1972 amendments was to expand

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[2]We are serving counsel for the other parties with copies of the Director's brief in *Perini*.

coverage "to protect *additional workers.*" S. Rep. No. 92-1125, 92d Cong., 2d Sess. 1 (1972) (emphasis added). The definition of covered employees under amended Section 2(3) "does not exclude * * * employees traditionally covered * * *." *Id.* at 16. Consequently, since *Parker* v. *Motor Boat Sales, Inc., supra,* established that even an employee's occasional ride in a motorboat on navigable waters is maritime employment, it follows a fortiori that an employee such as Schwabenland, who regularly piloted a small boat on navigable waters and who was injured while doing so, is covered by the amended Act. The result reached by the court of appeals thus falls squarely within the test the Director has urged in *Perini.*

2. Even if the court below correctly utilized the narrower coverage test challenged in *Perini,* its decision is plainly correct. Under that test, coverage is established if an employee's duties have "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.' " *Weyerhaeuser Co.* v. *Gilmore, supra,* 528 F.2d at 961, quoting *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U.S. 249, 272 (1972) (Pet. App. 8). Schwabenland's employment meets this test for two independent reasons.

First, piloting a vessel in navigable waters is a quintessentially maritime activity. This Court declared in *Parker* v. *Motor Boat Sales, Inc., supra,* 314 U.S. at 247, that riding in a boat on a navigable river is "clearly maritime." Moreover, this Court has only recently held that a collision between two recreational boats bears a sufficient relationship to traditional maritime activity to fall within federal admiralty jurisdiction, even though the boats had never

been used for commercial purposes. *Foremost Insurance Co.* v. *Richardson*, No. 80-2134 (June 23, 1982), slip op. 6.[3] Schwabenland regularly piloted his employer's boats on navigable waters, both in testing prototype models and in drag boat races, all for the commercial purpose of promoting his employer's business. In view of this Court's decisions in *Parker* v. *Motor Boat Sales, Inc.*, *supra*, and *Foremost Insurance Co.* v. *Richardson, supra*, the conclusion is inescapable that such activity has a significant relationship to traditional maritime activity.

Alternatively, Schwabenland meets the "navigation or commerce" test for the reason given by the court below—Schwabenland was closely involved with the construction of motorboats intended for use on navigable waters. He spent 30% of his working time inspecting boats in various stages of production (Pet. App. 2). In addition, he test-piloted prototypes of new model boats and occasionally performed maintenance work in the course of that activity (*id.* at 2-3). Such duties are "sufficiently related to the construction of the vessels to constitute maritime employment covered under the Act" (*id.* at 10).

Thus, petitioners' contention (Pet. 12) that the decision below "virtually eliminates the status requirement" of the LHWCA is plainly mistaken. Schwabenland's employment activities bore far more than a tangential relationship to traditional maritime activity. Whether the narrow test applied by the court below or the broader criterion urged by the Director in *Perini* is appropriate for determining coverage under the Act, it is evident that Schwabenland meets the "status" test of Section 2(3). In light of the fact that the

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[3] *Foremost Insurance* applied the precise *Executive Jet* test used by the court below. *Foremost Insurance Co. v. Richardson, supra*, slip op. 6.

result below does not conflict with the decision of any other court of appeals, there is no need to subject this case to further review.[4]

3. Petitioners' second contention (Pet. 15-18) is that the recreational boat industry as a whole is excluded from the Act. Both the court of appeals (Pet. App. 17) and the Benefits Review Board correctly rejected this argument and there is no contrary authority among the other courts of appeals.

The Act contains no explicit exclusion for the recreational boat industry, either as originally enacted or after the 1972 amendments. To infer such an exclusion, petitioners rely on a brief exchange between Representatives Graham and Abernethy during consideration of the original Act (68 Cong. Rec. 5403 (1927); Pet. 16). The 1927 Act, however, used a situs test as the exclusive means of establishing coverage, and the cited exchange is merely a discussion of the definitional reach of the term "dry dock" (see Pet. App. 29). The exchange does not suggest any congressional conclusion that certain employees were to be excluded solely because their employer dealt with recreational boats. On

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[4]Although petitioners do not specifically raise the issue here, they implicitly urge that the Benefits Review Board's "substantial portion" test should control the outcome of this case. The "substantial portion" test, however, is inconsistent with this Court's decisions in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 83 & n.18 (1979), and *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977), and it has been rejected by every other court of appeals that has considered it. *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340, 343-344 (1st Cir. 1981); *Boudloche* v. *Howard Trucking Co.*, 632 F.2d 1346, 1348 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981). See also *Garvey Grain Co.* v. *Director, OWCP*, 639 F.2d 366 (7th Cir. 1981); *Dravo Corp.* v. *OSHRC*, 613 F.2d 1227, 1233 n.9 (3d Cir. 1980). This issue, therefore, is no more appropriate for review than the questions raised directly by petitioners.

the contrary, if a worker in the recreational boat industry happened to be injured while at work on the water, he unquestionably would have been covered under the original Act.

Equally unavailing is petitioners' reliance (Pet. 17) on the Act's limited exclusion for certain employees working with vessels under 18 tons net. See 33 U.S.C. 902(3), 903(a)(1). That provision excludes these employees only when the master engages them to unload, load or repair such a small vessel. *Mississippi Coast Marine, Inc.* v. *Bosarge*, 637 F.2d 994, 998 (5th Cir. 1981); *Continental Casualty Co.* v. *Lawson*, 64 F.2d 802, 805 (5th Cir. 1933). Contrary to petitioners' suggestion, the existence of such a limited and explicit exclusion is strong evidence of congressional intent not to exclude other categories of workers dealing with small boats, such as employees in the recreational boat industry. *Mississippi Coast Marine, Inc.* v. *Bosarge, supra*, 637 F.2d at 999.

Nor can a contrary inference be drawn from the congressional consideration of the 1972 amendments to the LHWCA. While it appears that the recreational boat industry did not participate in the hearings on those amendments, that failure is not attributable to any deliberate exclusion of that industry from the coverage of the Act, as suggested by petitioners (Pet. 17). Given this Court's 1941 decision in *Parker* v. *Motor Boat Sales, Inc., supra*, which applied the Act to a motorboat dealer, and the clear purpose of Congress in 1972 to extend, rather than contract, the coverage of the Act, it is simply unreasonable to infer an exemption for the recreational boat industry merely because the industry was not mentioned during the 1972 debates. See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

4. Petitioners' last contention, that Schwabenland was excluded from coverage as the "master or member of a crew of any vessel," 33 U.S.C. 902(3) and 903(a)(1), comes too late, since this issue was raised for the first time in the court of appeals. Under this Court's ruling in *Parker* v. *Motor Boat Sales, Inc., supra*, 314 U.S. at 251, such tardiness is fatal to the claim. Petitioners' request (Pet. 21) for a remand on this issue must also be rejected, because granting this request would defeat the purpose of the rule that requires prompt presentation of such contentions. In any event, the contention is meritless. Schwabenland is not excluded from the Act on this basis because he lacks the requisite continuing and permanent connection with the vessel he was piloting at the time of his injury. See *Zientek* v. *Reading Co.*, 220 F.2d 183, 185 (3d Cir.), cert. denied, 350 U.S. 846 (1955); *Maryland Casualty Co.* v. *Lawson*, 94 F.2d 190, 192 (5th Cir. 1938).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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